Supreme Court, U. S.
FILED
FEB 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-896

In the Supreme Court of the United States

OCTOBER TERM, 1979

KARL R. HUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 603 F. 2d 387.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1979. A petition for rehearing was denied on October 10, 1979 (Pet. App. 29a-30a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including December 10, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court improperly instructed the jury that petitioner's ownership of seven corporations justified a finding that all of the corporations were parts of a racketeering "enterprise" within the meaning of 18 U.S.C. 1961 *et seq.*

2. Whether the count charging petitioner with conducting the affairs of an enterprise through a pattern of racketeering activity was duplicitous on the ground that it involved a series of offenses through a number of "enterprises."

3. Whether 19 counts charging petitioner with causing inflated depreciation claims to be filed with the government were multiplicitous because the claims were based on figures assertedly reflecting single repeated overcharges.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 19 counts of making and causing to be made false statements to the United States Department of Health, Education, and Welfare, in violation of 18 U.S.C. 1001 and 2. He was also convicted on eight counts of using the mails in furtherance of a scheme to defraud several businesses, two states, and the United States, in violation of 18 U.S.C. 1341 and 2, and on one count each of conspiring to commit mail fraud and to make false statements to HEW, in violation of 18 U.S.C. 371; making material false declarations before a grand jury, in violation of 18 U.S.C. 1623; and conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). The jury also returned a special verdict specifying that each of seven corporations named in the indictment was part of the racketeering enterprise.

Petitioner was sentenced to a total of four years' imprisonment, composed of concurrent terms of three years' imprisonment on the conspiracy and false statements counts and two years' imprisonment on the mail fraud counts, those terms to run consecutively to a

one-year term on the perjury count. He also was fined $5,000 on the conspiracy count and on each false statement count, and $1,000 on each mail fraud count, for a total fine of $108,000, and he was assessed the cost of the prosecution. In addition, petitioner was ordered either to forfeit his corporations (18 U.S.C. 1963(a), (c)), or to pay the government cash or other property valued at $100,000.[1] The court of appeals affirmed (Pet. App. A).

2. The evidence presented at trial is set out at length in the opinion of the court of appeals (Pet. App. 5a-7a, 14a-16a) and is not contested here. From 1971 through 1977 petitioner, a graduate of Princeton University and Harvard Law School, helped to operate a hospital supply business comprised of seven corporations. The business consisted of selling supplies, furniture, and equipment to hospitals in New York and New Jersey. Petitioner continuously manipulated the form of his business, transferring large sums of money among the constituent corporations. By fraudulently inflating invoices for goods and by charging for non-existent freight expenses, petitioner overcharged hospitals, and consequently the federal and state agencies that ultimately financed the hospitals' purchases, by approximately $471,000. Petitioner also caused the submission to federal and state agencies of numerous inflated depreciation claims totalling nearly $105,000.

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[1] Petitioner had been indicted with his father, Karl Huber, and two of their employees, Peter M. Conroy and Anthony W. Eckert, Jr. The proceedings against the senior Huber were severed for a separate trial because of his ill health. Conroy and Eckert pleaded guilty prior to trial, and each was sentenced to six months' imprisonment, three years' probation, and a $25,000 fine (Pet. App. 3a n.1).

ARGUMENT

The court of appeals rejected petitioner's claims in an extensive opinion on which we essentially rely (Pet. App. 1a-28a). That decision does not conflict with any decision of this Court or any court of appeals, and further review is unwarranted.

1. Petitioner contends (Pet. 16-24) that the district court erred in instructing the jury that proof of his ownership of all seven corporations named in the indictment, standing by itself, justified a verdict that each of the corporations was part of the alleged racketeering enterprise.[2] Because of this asserted error, he claims that he was required to forfeit his business interests in corporations that were not properly found to have been involved in the pattern of racketeering activity.[3] These contentions are without merit.

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[2]The portion of the charge challenged by petitioner is as follows (Tr. 6287):

> The indictment charges, and you must find beyond a reasonable doubt, that the defendant was employed by or associated with an enterprise, to-wit: Tudor Inc., Boden Inc., Atlantic Medical Corporation, Hospital Equipment Company, Debs Hospital Supplies Inc., Medical Facilities, Hospital Furniture/Medical Facilities.
>
> You are instructed that if you find the defendant owned one or more of the aforesaid corporations, subsidiary corporations, or corporate divisions (hereinafter referred to as corporations) through ownership, directly or indirectly, of a majority of the stock of such corporations, then you may find that such corporations so owned were associated in fact so as to constitute an "enterprise" within the meaning of the statute.

[3]As noted above, petitioner was required to forfeit his interests in the seven corporations comprising the enterprise or, alternatively, to pay the government $100,000.

As petitioner points out, one portion of the district court's instructions indicates that petitioner's ownership of the corporation is a sufficient basis for concluding that the corporation was part of an "enterprise" within the scope of the statute. The government acknowledged in the court of appeals that this aspect of the jury charge was incorrect (Pet. App. 13a): the statute punishes use of a corporation in a racketeering enterprise and not mere ownership of a corporation by someone otherwise engaged in racketeering. The court of appeals correctly concluded, however, that the trial court's instructions, viewed as a whole (*Cupp* v. *Naughten*, 414 U.S. 141 (1973)) and in light of the entire trial record (*United States* v. *Park*, 421 U.S. 658, 674-675 (1975)), demonstrate that no improper forfeiture occurred in this case.

The district court rendered a comprehensive charge. It read the racketeering count of the indictment and the racketeering statute to the jury, defining the terms "enterprise," "racketeering activity" and "pattern of racketeering activity." The court instructed the jury that it was required to find that "an enterprise within the meaning of the statute existed" (Tr. 6285). The trial court further charged the jury that if one or more of the corporations named in the indictment were owned by petitioner, that corporation *could* be found to constitute a racketeering enterprise (Tr. 6287). Finally, in explaining the special verdict, which required the jury to specify each corporation it found to be a member of the enterprise and also the extent of petitioner's ownership of each corporation, the court made clear that each corporation's involvement in the enterprise was a separate question from petitioner's ownership interest in each corporation (Tr. 6291).

The court of appeals therefore correctly observed (Pet. App. 14a) that "[r]eading the charge as a whole, we think the jury understood that it could not include a particular entity in the enterprise unless its affairs were found to have been conducted through the pattern of racketeering activity." Moreover, the evidence adduced at trial amply demonstrated that all seven corporations were thoroughly involved in petitioner's racketeering scheme. The interrelated corporations were all part of petitioner's fraudulent hospital supply business and petitioner freely transferred assets and contracts from one corporation to another in order to further his unlawful purposes (*id.* at 14a-16a).

2. Petitioner also argues (Pet. 18, 23-24) that the indictment was duplicitous because it charged a pattern of racketeering through seven different enterprises and that therefore the jury was not required to agree unanimously that each corporation's affairs was conducted through a pattern of racketeering. Petitioner's failure to raise this claim prior to trial constitutes a waiver, however. Fed. R. Crim. P. 12(b)(2); see, *e.g.*, *United States* v. *Viserto*, 596 F. 2d 531, 538 (2d Cir. 1979); *United States* v. *Gulino*, 588 F. 2d 256, 258 (9th Cir. 1978); *United States* v. *Busard*, 524 F. 2d 72, 73 (5th Cir. 1975), cert. denied, 426 U.S. 948 (1976); *Franklin* v. *United States*, 330 F. 2d 205 (D.C. Cir. 1963).[4]

[4]Although petitioner elsewhere claims that the indictment was ambiguous on its face (Pet. 16-17 n.*), he also argues that his waiver should be excused because the indictment charged a single offense whereas the government proved multiple offenses (*id.* at 18 n.*). Of course, insofar as the indictment clearly charged a single enterprise theory, it is not duplicitous. Nor was there a prejudicial variance in this case. See, *e.g.*, *United States* v. *Bailey*, No. 78-990 (Jan. 21, 1980), slip op. 18-19.

In any event, the court of appeals properly rejected this claim (Pet. App. 12a-13a). Although the indictment does use the word "enterprises" in several places, it is evident that the usage refers to "enterprise" in a non-technical sense and not to separate "enterprises" within the meaning of 18 U.S.C. 1961(4). Fairly read, the indictment informed petitioner that the government considered his seven corporations to be part of one unlawful enterprise. The government's proof and the trial court's charge to the jury were both faithful to this understanding, and the jury's conviction on all mail fraud counts and its special verdict as to each corporation demonstrates "that the jury was obviously not divided on the theory underlying its verdict of guilt" (Pet. App. 13a).

3. Petitioner further asserts (Pet. 25-28) that the 19 false statement counts were multiplicitous. These counts related to 19 annual depreciation-cost reimbursement claims submitted by six different hospitals. The statements, which are supposed to reflect the hospital's properly reimbursable costs, were false insofar as they were based on petitioner's false and overstated charges for equipment. Petitioner reluctantly acknowledges (Pet. 25) that he was therefore properly convicted on six counts—one for each hospital. He claims, however, that since the inflated cost figure upon which the hospitals' depreciation claims were based remained the same each year, he was guilty of only one wrong (*i.e.*, one false statement) per hospital. But 18 U.S.C. 1001 proscribes the filing of each false document and not merely the commission of each fraudulent scheme. Accordingly, as the court of appeals stated, just as the hospital "would have committed a separate violation with each annual claim," so too petitioner violated the statute each time he "caused the submission of [a false] statement[]" (Pet.

App. 24a). Accord, *United States* v. *Bettenhausen*, 499 F. 2d 1223, 1234 (10th Cir. 1974); *United States* v. *Grossman*, 154 F. Supp. 813, 818 (D.N.J. 1957).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

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[5]Petitioner's reliance (Pet. 26) on *Bramblett* v. *United States*, 231 F. 2d 489 (D.C. Cir.), cert. denied, 350 U.S. 1015 (1956), is misplaced. In *Bramblett*, a Congressman submitted false monthly compensation claims for a bogus clerk over a seven-month period. He was charged with multiple offenses—one for each claim—under the portion of 18 U.S.C. 1001 proscribing a *scheme* to falsify a material fact. The court of appeals held that that section of the statute reaches only the scheme itself and not the separate acts comprising the scheme, and that accordingly the defendant had committed only one continuing crime. 231 F. 2d at 491. In the instant case, however, petitioner was not charged under the fraudulent scheme provision of Section 1001, but rather with causing particular fraudulent statements to be made.

DOJ-1980-02